

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

LARRY LLOYD,

Plaintiff,

v.

PENNY L KINGSTON et al.,

Defendants.

CASE NO. 3:20-cv-05287-RBL-JRC

ORDER

The District Court has referred this action, filed pursuant to 42 U.S.C. § 1983, to United States Magistrate Judge J. Richard Creatura. Before the Court is Larry Lloyd's: (1) motion for leave to proceed *in forma pauperis* (IFP) in a § 1983 complaint (Dkt. 1); (2) second motion for leave to proceed IFP in a 28 U.S.C. § 2254 habeas corpus petition (Dkt. 11); and (3) a proposed habeas petition filed pursuant to § 2254 ("proposed petition") (Dkt. 10). Although Mr. Lloyd originally filed this cause of action as a § 1983 civil rights complaint, it appears that Mr. Lloyd now seeks to recharacterize his cause of action as a habeas corpus petition pursuant to § 2254. *See* Dkt. 10, 11.

After reviewing the second IFP motion and the proposed petition, Mr. Lloyd is advised that the Court intends to withdraw his § 1983 complaint and recharacterize this action as a

1 habeas corpus petition pursuant to § 2254. However, a review of Mr. Lloyd's proposed petition  
2 reveals deficiencies, and he must file an amended petition under § 2254 alleging facts, if any,  
3 showing that his ground for relief has been properly exhausted in state court, naming the proper  
4 respondent and otherwise showing cause why this matter should not be dismissed on or before  
5 September 10, 2020.

## 6 DISCUSSION

7 Mr. Lloyd, who is a Washington State prisoner currently incarcerated at the Coyote  
8 Ridge Corrections Center, filed this civil rights action on March 25, 2020. Dkt. 1. In the  
9 proposed complaint, Mr. Lloyd alleged violations of the Fourteenth Amendment's due process  
10 clause and the Eighth Amendment's prohibition against cruel and unusual punishment. Dkt. 1-1.  
11 Mr. Lloyd challenged the revocation of his community custody. *Id.*

12 On April 28, 2020, Mr. Lloyd was ordered to file a habeas petition under § 2254 on or  
13 before May 28, 2020. Dkt. 5. The Court advised Mr. Lloyd that he had not stated a claim for  
14 relief under § 1983. *Id.* After an extension, on July 22, 2020, Mr. Lloyd filed a proposed habeas  
15 corpus petition. Dkt. 10. In the proposed petition, Mr. Lloyd states that he is challenging his  
16 2014 conviction of possession of a controlled substance and assault in the second degree. Dkt.  
17 10. He raises one ground for relief, contending that his due process rights were violated when his  
18 community custody was revoked. Dkt. 10 at 26.

19 Based on the proposed habeas petition, it appears that Mr. Lloyd seeks to recharacterize  
20 his § 1983 complaint as a habeas petition. *See* Dkt. 10. Mr. Lloyd seeks relief in the form of a  
21 shorter sentence, and therefore a federal habeas petition is the proper vehicle for his requested  
22 relief. The court in *Castro v. United States*, 540 U.S. 375, 382–83 (2003) held that before  
23 recharacterizing a civil rights claim, a district court must “notify the *pro se* litigant that it intends  
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1 to recharacterize the pleading, warn the litigant that this recharacterization means that any  
2 subsequent [habeas petition] will be subject to the restrictions on ‘second or successive’ motions,  
3 and provide the litigant an opportunity to withdraw the motion or to amend it so that it contains  
4 all the [habeas] claims he believes he has.” *Id.* at 383; *see also United States v. Seesing*, 234 F.3d  
5 456, 464 (9th Cir. 2000) (holding that a court should not recharacterize a prisoner’s *pro se* filing  
6 as a federal § 2255 habeas petition when doing so would be to the prisoner’s disadvantage). To  
7 the extent that Mr. Lloyd seeks monetary relief in a habeas action, monetary damages are not  
8 available. *See* 28 U.S.C. § 2254; *McCarthy v. Bronson*, 500 U.S. 136 (1991) (recognizing two  
9 primary categories of suits brought by prisoners-applications for habeas corpus relief pursuant to  
10 28 U.S.C. §§ 2254 and 2255 and actions for monetary or injunctive relief under 42 U.S.C. §  
11 1983”).

12 Therefore, pursuant to the requirements of *Castro*, Mr. Lloyd is advised that the Court  
13 intends to recharacterize his § 1983 complaint as a § 2254 petition because the claims raised go  
14 directly to the constitutionality of Mr. Lloyd’s confinement itself. Mr. Lloyd is warned that if he  
15 chooses to do so, his petition will be subject to dismissal if he has already brought a habeas  
16 petition challenging his conviction or sentence unless Mr. Lloyd obtains permission to bring a  
17 second or successive petition.

18 Mr. Lloyd, however, is advised that he may pursue federal habeas relief only *after* he has  
19 exhausted his state judicial remedies. *See Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). The  
20 exhaustion of state court remedies is a prerequisite to the granting of a petition for writ of habeas  
21 corpus. 28 U.S.C. § 2254(b)(1). A petitioner can satisfy the exhaustion requirement by  
22 providing the highest state court with a full and fair opportunity to consider all claims before  
23 presenting them to the federal court. *Picard v. Connor*, 404 U.S. 270, 276 (1971); *Middleton v.*  
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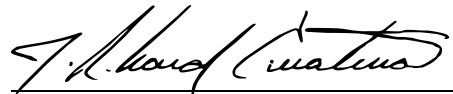
1 *Cupp*, 768 F.2d 1083, 1086 (9th Cir. 1985). Full and fair presentation of claims to the state court  
2 requires “full factual development” of the claims in that forum. *Kenney v. Tamayo-Reyes*, 504  
3 U.S. 1, 8 (1992). The petition indicates that Mr. Lloyd has not satisfied the exhaustion  
4 requirement by raising his claim to the state’s highest court. *See* Dkt. 10 at 4-7. Therefore, the  
5 petition is subject to dismissal without prejudice.

6 Additionally, Mr. Lloyd must name as respondent, the “person who has custody over [the  
7 petitioner].” 28 U.S.C. § 2242; see also § 2243; *Brittingham v. United States*, 982 F.2d 378 (9th  
8 Cir. 1992); *Dunne v. Henman*, 875 F.2d 244, 249 (9th Cir. 1989). According to his petition, Mr.  
9 Lloyd is currently confined at CRCC. Therefore, Mr. Lloyd must name the superintendent of his  
10 facility as respondent.

11 With respect to Mr. Lloyd’s two pending applications to proceed *in forma pauperis*, (Dkt. 1, 11)  
12 no action will be taken until and unless the deficiencies outlined above are corrected and Mr.  
13 Lloyd has been advised that the Court recharacterizes this action as a habeas corpus petition. If  
14 Mr. Lloyd was allowed to proceed *in forma pauperis* in a § 1983 action based on his first  
15 application (*see* Dkt. 1), he would be required to pay the \$350.00 filing fee in installments from  
16 his prison trust account pursuant to § 1915(b) (prisoners are required to pay an initial partial  
17 filing fee followed by installment payments in cases where the prisoner is unable to pay the  
18 entire filing fee at the beginning of the civil action). The filing fee for a *in forma pauperis* habeas  
19 petition is \$5.00. By deferring consideration of Mr. Lloyd’s applications to proceed *in forma*  
20 *pauperis* until he has been advised of the Court’s recharacterization of this action and corrected  
21 the deficiencies outlined above, Mr. Lloyd will avoid being required to pay the full § 1983 filing  
22 fee on an action that is unlikely to proceed forward in its present posture. Based on the  
23 foregoing, this Court does hereby ORDER as follows:  
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- (1) Mr. Lloyd must file by September 10, 2020 an amended petition under § 2254 alleging facts, if any, showing that his grounds for relief have been properly exhausted in state court, naming the proper respondent and otherwise showing cause why this matter should not be dismissed. The amended petition should contain *all* habeas claims he intends to raise.
- (2) Failure to timely comply with this order will result in a recommendation that this action be dismissed.
- (3) The Clerk shall send a copy of this order to Mr. Lloyd and the Court's § 2254 form petition.
- (4) The Clerk shall re-note Mr. Lloyd's two applications to proceed *in forma pauperis* (Dkt. 1, 11) for consideration on September 10, 2020.

Dated this 12th day of August, 2020.



J. Richard Creatura  
United States Magistrate Judge